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Chairman: Ms. Baja ..... (Philippines)

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The meeting was called to order at 10.05 a.m.

Agenda item 152: Report of the International Law Commission on the work of its fifty-fifth session (*continued*) (A/58/10)

1. **Mr. Candioti** (President of the International Law Commission), introducing Chapters IX and X of the report of the Commission, said that the Commission had considered the first report of the Special Rapporteur on shared natural resources (A/CN.4/533 and Add.1) and had expressed support for the prudent approach taken by the Special Rapporteur, who had emphasized the need for further study of the technical and legal aspects before taking a final decision on how the Commission should proceed. Some Commission members had voiced doubts regarding the contribution which the Commission might be able to make regarding the regulation of oil and gas, whose problems were of a different nature and which were usually addressed through diplomatic and legal processes. It had been suggested that consideration of those two subtopics should be postponed until the work on groundwaters had been concluded and that regional developments should be taken into consideration; in that regard, it had been noted that existing international agreements referred only to the management of natural resources, not to their ownership or exploitation.

2. It had been generally agreed that the Special Rapporteur should undertake a comprehensive study of confined groundwaters, including the protection and exploitation of aquifers, which would also be helpful in ascertaining the extent to which the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses were applicable to confined transboundary groundwaters. The debate had highlighted the need to reconsider the definition of groundwater since the concept used thus far seemed to differ from the one used by hydrogeologists. The need to understand the differences between confined groundwaters and surface waters had also been pointed out; in that regard, the Commission had had a useful informal briefing by experts on groundwaters from the Food and Agriculture Organization of the United Nations (FAO) and the International Association of Hydrogeologists (IAH). Lastly, he reiterated the request that States should comment on the issues raised in paragraph 40 of the report of the Commission.

3. Turning to Chapter X of the report, he noted that in 2000, after considering the feasibility study undertaken on the topic entitled "Risks ensuing from fragmentation of international law", the Commission had decided to include the topic in its long-term programme of work and to establish a Study Group chaired by Mr. Bruno Simma. It had also decided to change the topic's title to the current one in order to avoid placing fragmentation in too negative a light and to undertake a series of studies, beginning with one entitled "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

4. During the current year, the Commission had taken note of the report of the Study Group, which had established a schedule of work for the period 2003-2006, distributed among its members the work to be undertaken on the remaining recommended studies and decided upon the methodology to be adopted for that work. The five recommended studies would be completed in 2005. The Study Group would hold a first discussion on the nature and content of possible guidelines to be proposed for adoption by the Commission at a later date and in 2006, it would collate the final study covering all topics, including the elaboration of possible guidelines.

5. The Study Group had been of the opinion that the topic was of contemporary interest, particularly in view of the possibility of conflicts emerging at the substantive and procedural levels as a result of the proliferation of institutions that applied or interpreted international law. The Study Group had been sensitive to the expressed view that the Commission should not act as referee in relationships between institutions or deal with questions concerning the creation of, or the relationship among, international judicial institutions. It was also cognizant of the need to avoid drawing hierarchical analogies with domestic legal systems.

6. In that context, the Study Group had agreed that a distinction ought to be made between institutional and substantive perspectives. While the institutional perspective focused on questions of practical coordination and institutional hierarchy and on the need for international courts and tribunals, in particular, to pay attention to each other's jurisprudence, the substantive perspective involved consideration of whether and how the substance of the law itself had fragmented into special regimes which might be lacking in coherence or were in conflict with each other. In dealing with the substantive aspects of fragmentation, the Study Group

would bear in mind that there were at least three different patterns of interpretation or conflict, reflected in paragraph 419 of the Commission's report, which must be kept distinct.

7. In that connection, it had been considered useful that the study of the function and scope of the *lex specialis* rule and the question of "self-contained regimes" should contain an analysis of the general conceptual framework proposed, which distinguished between the three types of normative conflict. While it was understood that fragmentation through conflicting interpretations of general law was not necessarily a case of *lex specialis*, it was considered an important aspect of fragmentation worth further study. Mindful also of the sensitivity of addressing institutional issues, it had been suggested that such consideration should be confined to an analysis and assessment of the issues involved, including the possibility of making practical suggestions.

8. Lastly, the Study Group had exchanged views on the preliminary conceptual questions relating to the function and scope of the *lex specialis* rule, the different contexts in which it operated and the alleged existence of "self-contained regimes" and had reached a number of preliminary conclusions on the scope of the study and how it should be approached.

9. **Mr. Rosand** (United States of America), speaking on reservations to treaties, said that it would not be desirable to define the term "objection" in the guidelines. Practice demonstrated that States and international organizations objected to reservations for a variety of reasons, often political rather than legal in nature, and with different intentions. For example, in signing the Vienna Convention on the Law of Treaties, a number of States (including his own) had made objections to certain reservations made by States which were already parties to that instrument; those objections did not purport to prevent the application of any treaty relations between the United States and those parties since no treaty relations flowed from the signing of the Convention. Adoption of the definition proposed by the Special Rapporteur would deny States their current flexibility in objecting to reservations.

10. The Special Rapporteur had also proposed that the exceptional rule for late formulation of a reservation should be extended to include enlargement of the scope of a reservation. Existing practice seemed rightly to be limited to cases where, owing to clerical errors, States inadvertently failed to deposit reservations along with the instrument of ratification. Extending the rule to include enlargement of the scope of a reservation would be inconsistent with the timing requirements of the Vienna Convention and could undermine the stability of treaty obligations.

11. He was concerned at the Special Rapporteur's proposal to subject modification of a conditional interpretive declaration to the unanimity rule applicable to late reservations; it did not seem appropriate to treat conditional interpretive declarations more strictly than reservations.

12. His delegation had already expressed scepticism that the development of a body of rules governing unilateral acts would be appropriate or helpful given the great variety of contexts in which such acts might occur. It remained sceptical; in particular, the topic should not be expanded to include consideration of conduct. He urged the Commission to consider ending its work on the topic.

13. **Ms. Loffler** (Australia) said that on the topic of unilateral acts of States, her delegation agreed with the Commission's decision to begin a study of the conduct of States which might create obligations or produce legal effects similar to those of unilateral acts *stricto sensu* and supported the approach of adopting guidelines or recommendations in that regard. Emphasis should be placed on the conduct of States which evinced an intention to create legal obligations and on how to ascertain that intention. As in the case of unilateral acts *stricto sensu*, borrowing from municipal legal concepts such as estoppel might be of assistance, particularly in considering other States' reasonable expectations to which the conduct in question might give rise.

14. The scope of the topic should be strictly monitored, bearing in mind the ultimate objective of determining the legal effects of certain unilateral acts. Accordingly, acts of recognition by acquiescence, those based on treaty and expressed through United Nations resolutions, and those emanating from international organizations should be excluded from consideration.

15. One issue of particular concern to her delegation was that of the modification, suspension and revocation of unilateral acts. A State could modify, suspend or revoke an act unilaterally and that entitlement should not be conditional on factors such as whether the possibility of variation was provided for in the act or whether there had been a fundamental change of circumstances.

16. Turning to the topic of reservations to treaties, she said that Australia agreed with the view, expressed by the Special Rapporteur and other members of the Commission in connection with draft guideline 2.6.1, that any definition of objections included in the draft guidelines should be consistent with the relevant provisions of the Vienna Convention on the Law of Treaties and should take State practice into account. The concept of intention was a key factor in determining whether a reaction to a reservation amounted to an objection, and that should be reflected in the definition of objections. With respect to draft guideline 2.1.8, the role of the depositary in relation to manifestly impermissible reservations should be aligned with the provisions of the Vienna Convention and, in particular, article 77 thereof. The depositary should be impartial and neutral in the exercise of its functions and should be limited to transmitting reservations to the parties to the treaty; it should not be assigned the role of expressing a view regarding the impermissibility of a reservation.

17. **Ms. Buang** (Malaysia) said that she welcomed the Austrian and Swedish initiative to revitalize the debate on the item in the Committee. Turning to the topic of unilateral acts of States, she agreed that, in the interests of security, there was a need to elaborate clear guidelines so that States would know when the unilateral expression of their will or intentions would be taken to be legally binding rather than as mere political statements. Noting that the scope of the topic had been confined to unilateral acts of States *stricto sensu*, she said that recommendations 1 to 7 as contained in the report of the Working Group, which set out guidelines for its future work, were generally acceptable; recommendation 7 was particularly noteworthy.

18. She also welcomed the proposal for the Commission to study the conduct of States which might produce legal effects similar to those of unilateral acts with a view to the preparation of guidelines or recommendations thereon. In addition to the forms of States' conduct identified by the Commission, silence, acquiescence and conduct expressed through United Nations resolutions or the acts of international organizations should also be considered.

19. The fact that a unilateral act could be undertaken by one or more States jointly or in a concerted manner, as in the case of collective recognition of a State or a situation, should also be addressed in the draft articles. Classification and interpretation of the various related issues, such as the definition of unilateral acts of States, was a difficult task that would require the cooperation and support of all States since the draft articles were an attempt to codify State practice and to develop progressive guidelines thereon. Her delegation appreciated that the Commission was making concerted efforts to obtain the views and positions of States on that issue.

20. With regard to reservations to treaties, she welcomed the Special Rapporteur's proposal to formulate a broad definition of objections to reservations. A clear guide to what constituted an objection to a reservation was timely since current practice had revealed divergence and caused uncertainty among States. The definitions of "objection" proposed in draft guidelines 2.6.1, 2.6.1 bis and 2.6.1 ter made it clear that the effect of a unilateral statement would be conclusive regardless of the formulation used; by omission, they also appeared to indicate that other types of unilateral responses to reservations, such as those intended to persuade the reserving State to withdraw or modify its reservation, were not genuine objections. The Commission had requested specific examples of genuine objections which did not contain the term "objection" or an equivalent term and of critical reactions which could be clearly characterized as non-objections. She reiterated her delegation's view that, first, the intention of the objecting State was paramount, regardless of the flexibility accorded as to which acceptable formulations indicated genuine objections; and, second, States themselves should clarify the issue by using the word "objection" if that was their unilateral response to a reservation since that was the term used in articles 20 and 21 of the 1969 and 1986 Vienna Conventions. Alternative formulations acceptable to her delegation were "rejects formally the reservation" and "does not recognize the validity of ...". On the other hand, she agreed that the arbitral award in the *Mer d'Iroise* case reflected State practice and that the expressions "unable to accept" and "could not consider" were vague and unacceptable.

21. With reference to paragraph 352 of the report of the Commission, she supported the proposal that a draft guideline should be prepared to encourage States to give the reasons for their objections, even though that would depart from the traditional norm. The reserving State would then have an opportunity to evaluate the

validity of the objection, carry out an informed review of its reservation and, if necessary, formulate an appropriate justification and response to the objecting State or withdraw or modify the reservation. Such a requirement would also ensure that the mechanism was not abused in order to inconvenience or pressure the reserving State. Lastly, she suggested that the Guide to Practice should include a draft guideline to the effect that non-contracting States could not formulate objections to a reservation made by a contracting State; common article 23, paragraph 1, of the Vienna Conventions did not provide that the non-contracting State was entitled to make an objection, just as it could not make or accept a reservation.

22. **Mr. Nguyen Duy Chien** (Viet Nam), speaking on the topic of reservations to treaties, noted that in draft guideline 2.5.3 of the Guide to Practice, the words "internal law" was also applied to international organizations; it would be more appropriate to use those words only for States and to speak of the "rule of international organizations" when referring to them. In addition, the title of draft guideline 2.5.4 should be changed to "Competence to withdraw a reservation at the international level" in order to reflect more precisely the substance of that provision.

23. With respect to objections to reservations, his delegation was still considering the new version of draft guideline 2.6.1, proposed by the Special Rapporteur in paragraph 363 of the report of the Commission. As a preliminary observation, however, he noted that an objection formulated by a State or international organization could totally or partially prevent a reservation made by another State or international organization from having effect, but only in relations between the reserving State or international organization and the objecting State or international organization. In no case would it affect relations between the reserving party and other contracting parties; that point should be made clear in the definition, perhaps by adding some elements to the end of the new version.

24. **Mr. Fife** (Norway), speaking on behalf of the Nordic countries on the topic of shared natural resources, said that he welcomed the priority given by the Commission to that issue, which it had begun to codify in 1994 in the context of the law of non-navigational uses of international watercourses and the Commission's resolution on confined transboundary groundwaters. The past decade had seen great scientific progress in that area and 2003 had been declared the International Year of Freshwater. Groundwaters had an obvious bearing on international peace and security, human health and the protection of the environment; their effective, sustainable management was essential for poverty eradication and ecosystem protection. That required increased resources; sound, effective governance and a stronger focus on international cooperation. Any doubts as to whether the issue was ripe for codification should have been overcome; however, he wished to put forward some general reflections on legal methodology. The Commission had noted certain parallels between the law relating to groundwaters and that governing the exploitation of oil and gas. The Nordic countries noted that there could be no doubt that confined transboundary groundwaters constituted, in principle, a non-renewable natural resource subject to national sovereignty and jurisdiction in accordance with international law. The fact that the course of a boundary provided for jurisdictional clarity offered a point of departure for a stable legal framework regulating the management of resources, without prejudice to the development of close transboundary cooperation. In the areas of oil and gas, building on basic jurisdictional clarity had made transboundary arrangements possible; considering the whole deposit or reservoir as an integrated unit allowed for rational exploitation by a single operator and fair, objective revenue sharing between the parties on either side of the boundary. However, any intimation that the term "shared resources" referred to a shared heritage of mankind or to notions of shared ownership would be misleading. In any case, the Nordic countries cautioned against drawing overly close parallels with oil or gas since that would overlook the essential role of groundwaters for, inter alia, broader ecosystems, biodiversity and human health. Once extracted, groundwater was vulnerable to degradation and depletion as recharge would, at best, take years.

25. The Commission had requested information on the main uses of specific groundwaters, State practice relating to their management, contamination problems and preventive measures being taken. The comprehensive studies carried out by various international bodies showed that the number of competing users and the potential polluters covered a broad spectrum of human activities. He also noted the role played by the World Water Council, an association of expert and professional organizations in the water sector, which had been established in 1996 and had

organized the first World Water Forum in Egypt in 1997. The Ministerial Declaration adopted at the third World Water Forum, held in Kyoto in March 2003, urged countries to review and, when necessary, to establish appropriate legislative frameworks for the protection and sustainable use of water resources and for water pollution prevention. In the view of the Nordic countries, the Commission should be able to draw on the policy guidelines and decisions taken at those conferences with regard to sound management of water resources, especially groundwaters.

26. The Nordic countries had or were preparing national legislation aimed at ensuring an integrated management responsibility with regard to groundwaters, including through mapping, reporting on resources and the establishment of groundwater site inventories, groundwater level data and water quality data. Particularly noteworthy was European Community Directive 2000/60/EC, which formed an umbrella over 20 other such directives and constituted the framework of a comprehensive water management policy for many European countries.

27. The Nordic countries recognized the particular relevance of the codification efforts undertaken on the issue of water as a natural resource by private international law bodies, including the 1966 Helsinki Rules on the Uses of the Waters of International Rivers; the Seoul Rules on International Groundwaters, adopted at the 1986 conference of the International Law Association, and the Bellagio draft treaty on the use of transboundary groundwaters, prepared by an independent group of international experts. They also recognized the adoption of the 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses as an important general framework for orderly international processes to deal with international water issues by offering a very minimal point of departure in the codification of rules concerning confined transboundary groundwaters, which should be put into effect through cooperation among the watercourse States concerned. The particular vulnerability of such water and its vital role in many contexts called for heightened standards of due diligence as compared to principles concerning surface water, including the obligation to protect them from pollution and to prevent significant harm.

28. The Nordic countries were ready to support the Commission's study and its eventual elaboration of a set of common principles which could be applied at the local and global levels, helping States and peoples to cooperate with each other for their common benefit and survival.

29. **Mr. McDorman** (Canada) said that since Canada shared an international land boundary only with the United States of America, the issue of groundwater pollution was an exclusively bilateral one in its case. With respect to jurisdiction and to the regulation of groundwaters, the relationship between those countries was generally governed by the 1909 International Boundary Waters Treaty and, specifically, the 1978 Great Lakes Water Quality Agreement, amended in 1987. The two agreements interacted principally through the International Joint Commission, a bilateral institution created by the Treaty and given additional responsibilities by the Agreement.

30. The Treaty contained no explicit provisions dealing with groundwaters, though article IV thereof provided a general prohibition against polluting boundary waters or waters flowing across the boundary to the injury of health or property. However, the Joint Commission had recently shown concern for groundwater pollution.

31. Moreover, the Agreement provided a more detailed set of standards designed to prevent pollution of the Great Lakes and made the Joint Commission responsible for their condition. In 1987, an additional annex 16, which dealt with pollution of the Great Lakes from contaminated groundwaters, had been created; it required the parties to identify existing and potential sources of contaminated groundwater, develop standard approaches in sampling and analysis, control sources of contamination where problems were identified and report to the Joint Commission biennially.

32. Canada supported and encouraged the Commission's work with regard to the development of a database on problems and ways of enhancing the protection and sustainable use of groundwaters. At present, however, it believed that much more information must be gathered and contemplation of the issues undertaken before a discussion of legal principles would be timely.

33. **Mr. Ascencio** (Mexico), speaking on the topic of shared natural resources, stressed the need to establish a legal framework to clarify general legal principles, especially the obligation to cooperate in the management and conservation of important resources from the environmental, social and economic

perspectives. With respect to scope, his delegation supported the proposal to begin by considering the topic of confined transboundary groundwaters and, at a later date, aspects relating to oil and gas resources, without prejudice to the ultimate preparation of a single report covering all three resources and indicating the principles applicable to each of them.

34. With regard to the questions raised by the Commission in Chapter III of its report, underground aquifers were important in Mexico since they provided about 50 per cent of the country's extracted water for all purposes, including farming and the public and industrial water supply; water was recognized as an essential resource for social well-being and productive activities, the right of future generations to the water they would need for their own well-being and development, and the environment as a "user" of water.

35. Aquifers were polluted as a result of overuse and saline intrusion; 97 of Mexico's 654 aquifers (including 21 of the 96 known aquifers in the Rio Grande/Rio Bravo region) were overused and the recharge rate was scarcely greater than the extraction rate. Measures aimed at alleviating and preventing pollution problems should be limited to protecting ecosystems through sustainable water resource management and should focus on cooperation in the efficient use of water and in its protection and conservation for future generations.

36. Since national legislation applicable to such resources generally took the form of federal or local regulations, coordination and cooperation at those levels was essential. Mexican Federal law called for promoting the coordination of action at all levels and encouraging the participation of users and individuals in the execution and management of the relevant projects and services.

37. There were also international, and especially bilateral, agreements on the shared use of surface waters and groundwaters. The most representative example was probably the International Boundary and Water Commission (IBWC) on the use of water from the Colorado and Tijuana Rivers and of the Rio Grande/Rio Bravo, made up of representatives of Mexico and the United States of America. The work of that bilateral body might provide an interesting basis for the International Law Commission's studies.

38. On the topic of the fragmentation of international law: difficulties arising from the diversification and expansion of international law, his delegation did not question the Commission's decision to address only the so-called "substantive" aspect of the fragmentation of international law and not to deal with the issue of institutional proliferation since the Commission should not act as a referee in the relationships between international legal institutions. In any case, the Commission would inevitably need to consider the latter issue in the context of the study of the normative hierarchy in international law; for example, the situation where one court departed from the reasoning in another court's judgement was mentioned as one pattern of conflict between different understandings of international law.

39. With respect to the study on the function and scope of the *lex specialis* rule and the question of "self-contained regimes", the Commission should consider the issues governed by regional regulations, particularly in the context of the work of the regional arrangements or agencies mentioned in Chapter VIII of the Charter of the United Nations in relation to the collective security system regulated by the Charter and to the functioning of regional mechanisms for the peaceful settlement of disputes and preventive diplomacy. Lastly, he urged those responsible for the five studies to send questionnaires to States and international organizations in order to promote a useful exchange of views and avoid an overly theoretical approach.

40. **Mr. Wada** (Japan), said that in discussing the subject of shared natural resources, it was important to have a clear picture of the entire subject and to take a pragmatic approach. In that regard, the Commission had been prudent in deciding to move forward step by step, beginning with confined transboundary groundwaters.

41. As an island country, Japan had no transboundary groundwater resources. Nonetheless, groundwaters had been a very important resource for the Japanese people, who obtained drinking water from wells and used thermal springs with rich minerals for spas. At present, about 30 per cent of water for urban activities was provided by groundwaters.

42. Groundwater pollution in Japan had increased in recent years; according to a 1993 survey, it had been detected in 1,551 areas. Various measures had been taken to address that issue, including laws and regulations on the regulation of industrial wastewater. The Basic Environment Law, which had entered into force in 1993, provided a framework for the

Government's environmental protection and conservation efforts; other laws and regulations had a more specific focus on the protection of water, including groundwaters. For example, the Water Pollution Control Law described specific measures to be taken in order to control industrial effluents and required the authorities to monitor groundwater quality. The Government also conducted an annual survey on the quality of groundwaters.

43. While Japan had not concluded any agreements with other States on transboundary groundwater resources, it had an extensive record of international cooperation in maintaining and improving water quality in other countries through its official development assistance (ODA) projects. It would submit a detailed report on its laws, regulations and cooperation measures in due course; a careful, in-depth analysis of State practice and existing international agreements were indispensable to study of the topic.

44. Turning to the topic of the fragmentation of international law, he said that international law had developed so rapidly that it was increasingly difficult to gain a comprehensive understanding of its configuration; for instance, the issue of trade was closely linked to the environment, development and even human rights through areas such as workers' rights. It was therefore extremely important in the treaty-making process to have a clear understanding of the treaty's possible impact on other related areas.

45. His Government basically supported the direction taken by the Commission and the five subtopics which it had chosen to study and which could be applied to wide-ranging areas of international law. The examples cited in the Commission's report revealed that conflicts of law could arise in the application and interpretation of any area of international law. It might be possible to develop some guidelines, but the Commission should take care not to apply general principles drawn from a limited number of specific cases; it would need to decide whether to narrow the scope of application of the guidelines that it was to propose or to embark on a far more thorough study of each aspect of the potential conflicts of law. It might be more realistic to adopt the former approach, including a form of saving clause which would state that the guidelines would be applicable without prejudice to the future development of laws and agreements reached by States on any given subject.

46. Lastly, on the subject of the "self-contained regime", the Commission's members seemed to agree on the difficulty of differentiating between primary and secondary rules. Even though some self-contained regimes had their own secondary rules, that did not categorically preclude the application of general law. The Chairman of the Study Group had pointed out that general law would be applicable in a self-contained system where a situation such as State succession was not provided for within the regime or where the dispute settlement or compliance mechanism of the regime failed to operate. It seemed more important to recognize the second aspect of general law, that of serving as a safeguard by providing appropriate normative guidelines for settling disputes and clarifying situations where a conflict of law existed. It was important not to dwell too much on the issue of the "self-contained regime" per se when discussing the issue of fragmentation and to pay more attention to the issue of *lex specialis* and general law, as the Commission appeared to be doing.

47. **Mr. Guan** Jian (China), speaking on the topic of shared natural resources, said that he supported the Commission's decision to begin a study of confined groundwaters since those resources were closely linked to the productive activities and livelihood of mankind; the preliminary study used in drafting the Convention on the Law of the Non-navigational Uses of International Watercourses and some principles embodied therein could also be applied to confined groundwaters. Since actions in one State had an impact on the use of groundwaters in other States, the Commission should take into consideration the interests of all States and, to the extent possible, ensure their sovereignty over those resources and the security thereof.

48. Scientific research had revealed that, just as the impact of human activities on confined groundwaters varied in degree, the time it took for that impact to be felt also varied. The topic involved a great deal of science, and the Commission should conduct the study on the basis of ample scientific evidence in order to gain a full picture of the hydrogeological features of confined groundwaters throughout the world. It should also take a practical approach by focusing on solving current issues or issues about to occur in the near future.

49. With respect to the fragmentation of international law, consideration of the *lex specialis* rule and the question of "self-contained regimes" should aim to

clarify the inherent lack of coherence and certainty in international law and to show ways of resolving problems arising from its application. The study of the five selected issues was of both theoretical and practical importance, particularly in the case of the *lex specialis* rule, the modification of multilateral treaties between some of the parties only, and hierarchy in international law because it would facilitate a unified understanding of those issues by the international community, reaffirm the fundamental status of the basic principles of international law, regulate international practice and contribute to the rule of law at the international level.

50. **Ms. Telalian** (Greece) reiterated the importance of the topic of reservations to treaties and of the early adoption of a Guide to Practice that would supplement the Vienna Convention on the Law of Treaties; the Commission should now embark on a thorough study of the legal effects of reservations and objections. Although articles 20 and 21 of the Vienna Convention regulated the acceptance of and objections to reservations and the legal effects of objections, they did not give satisfactory answers to a number of important questions, especially that of whether those articles applied to all reservations, both admissible and inadmissible. Her delegation supported the statement made by the representative of Sweden concerning the legal effects of inadmissible reservations and believed that reservations which were incompatible with the object and purpose of a treaty were inadmissible and could not be accepted by the other States parties. Likewise, the doctrine of the opposability of a reservation could not be raised in relation to an impermissible reservation; that position was reflected in recent State practice, particularly in the area of human rights. Many countries, including Greece, had raised objections to reservations that were incompatible with the object and purpose of human rights conventions in order to preserve the integrity of those instruments and the effective, uniform implementation of their norms. Furthermore, the reaction of other States could lead to withdrawal of the reservation by the State concerned and was of great importance to human rights supervisory institutions, as seen in the European Court of Human Rights consideration of the *Loizidou* case. State practice demonstrated that objections raised in the context of human rights instruments did not simply address the issue of the incompatibility of a given reservation; they also determined the legal consequences of an invalid reservation. It must be stressed that in many instances, objecting States had applied the severability principle to unacceptable reservations by considering the treaty operative for the reserving State without the benefit of the reservations.

51. The definition of objections to reservations that had been proposed by the Special Rapporteur in Chapter II of his eighth report was too narrow in describing the legal effects of objections since it did not take State practice on that issue into account. She therefore preferred the Special Rapporteur's alternate proposal in paragraph 363 of his report, which was of a more general nature and could cover the other types of objections raised recently by States. The intention of States or international organizations was a key element in the definition of objections; she stressed that that intention should be clearly derived from the text of the objection, without the need for interpretation. In that respect, she supported the Special Rapporteur's intention to include the concept of a "reservation dialogue" in his next report.

52. On the issue of grounds for objections, it was important for States and international organizations to express clearly and unequivocally the reasons for their objection; recent practice showed that States were more willing than ever to indicate the legal reasoning for considering a reservation unacceptable and the legal effects of such a determination.

53. With respect to draft guideline 2.3.5 (Enlargement of the scope of a reservation), her delegation believed that there was a fundamental difference between the formulation of late reservations and the enlargement of their scope; the latter was a dangerous course that might jeopardize international legal certainty. She therefore fully agreed with the Secretary General of the Council of Europe that such practices should be prohibited.

54. **Mr. Dhakal** (Nepal) said that he welcomed the joint initiative of the Austrian and Swedish delegations to revitalize the debate on the Commission's report. Turning to the topic of the responsibility of international organizations, he said that in view of the diversified characteristics of those organizations, the three proposed draft articles on the scope of the work and general principles required further careful consideration. The rules governing the establishment, membership and operation of international organizations were not identical or uniform and a

distinction must be made between the international legal personality of international organizations and of States. He agreed with the Working Group on Responsibility of international organizations that the responsibility of organizations established under municipal law and of non-governmental organizations should be excluded from scope of study.

55. He was pleased that the Commission planned to complete the first reading of the draft articles during the coming year and called for further consideration of diplomatic protection of legal persons, taking into account existing international customary law and the growing number of bilateral and multilateral investment treaties in the age of globalization.

56. Turning to the topic of international responsibility for injurious consequences arising out of acts not prohibited by international law, he said it would be appropriate for the Commission to give continued attention to the relationship between prevention and liability in that area and called for a balance between the need to take action and to provide relief for harm caused despite preventive measures.

57. On the complex topic of unilateral acts of States, which had been on the Commission's agenda since 1996, he noted the Commission's concern at the lack of information on State practice; it should continue to focus on unilateral acts stricto sensu in the manner described in paragraph 31 of the report of the Commission.

58. Reservations to treaties must be formulated in writing. While the draft guidelines would be of assistance to States and international organizations, they should not alter the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions. He agreed with the Commission that international law did not impose any specific rule with regard to the internal procedure for formulating reservations. With respect to the enlargement of the scope of a reservation and a definition of objections to reservations, the Commission should continue to work on the basis of State practice and the provisions of the Vienna Convention.

59. He supported the inclusion of groundwaters, oil and gas under the topic of shared natural resources. The study on groundwaters would not only help codify international rules; it would also alleviate the suffering of millions of people suffering from water-borne diseases in many developing countries. State practice with respect to uses and management, including pollution protection; cases of conflict; and domestic and international rules on the issue should be studied.

60. He noted the progress made on the topic of the fragmentation of international law and the decision to undertake studies on the function and scope of the *lex specialis* rule and the question of "self-contained regimes".

61. Lastly, he reiterated his delegation's position that Member States should revisit the question of honoraria and ensure that the Special Rapporteurs' work was not adversely affected by budget cuts. In addition, the Commission should provide technical assistance to the least developed countries so that they could develop their national capacity to submit the information which it requested.

62. **Ms. Beshkova** (Bulgaria) said that she welcomed the Commission's adoption of articles 1 to 3 of the draft articles on responsibility of international organizations and considered that it would be reasonable to follow the approach taken on the topic of State responsibility. At the same time, some issues not addressed in the articles on responsibility of States for internationally wrongful acts — for example, the responsibility of a State member of an international organization for a wrongful act committed by that organization — should be included. She took note of the definition of "international organization".

63. On the topic of reservations to treaties, she welcomed the adoption of the 11 draft guidelines (with 3 model clauses) dealing with withdrawal and modification of reservations and interpretive declarations. Such guidelines were necessary in order to fill the gaps in the Vienna Convention on the Law of Treaties with respect to treaties between States and international organizations or between international organizations and to serve as a guide to States. The definition of objections should be much more flexible and should take State practice into account. A distinction should be made between objections to "permissible" and "impermissible" reservations; in that connection, she supported the Special Rapporteur's proposal that the Commission should give further consideration to the definition of objections.

64. She supported the decision of the Special Rapporteur on shared natural resources to conduct studies on the practice of States with respect to uses and management, including pollution prevention, as

well as domestic and international rules, in order to extract some legal norms from existing regimes and to prepare draft articles. At the same time, the term "confined transboundary groundwaters" should be precisely clarified with the assistance of experts and the differences between confined groundwaters and surface waters should be pointed out.

65. Inclusion of the topic of the fragmentation of international law in the Commission's agenda marked a significant development and went beyond the traditional codification approach. The scope of that topic should not be limited to the negative effects of the fragmentation process; it should also aim to identify the potential positive results of that process. She fully supported the proposal that the study on the function and scope of the *lex specialis* rule and the question of "self-contained regimes" should cover two different contexts: the *lex specialis* as an application of general law in a particular situation and as an exception to the general law.

66. **Mr. Musud** (Pakistan) said that the regime of reservations to treaties established in the 1969, 1978 and 1986 Vienna Conventions had, by their wide acceptance, acquired the status of customary norms; it would not be wise to derail them. The existing regime was adequate and flexible and had not posed any problems. In fact, it stuck a balance by imposing a limit on reserving States by providing that such reservations should not be incompatible with, on the one hand, the object and purpose of the treaty and, on the other, the need to ensure universal participation therein. Pakistan did not favour making a distinction between human rights treaties and other treaties in the context of reservations and the 1969 Vienna Convention did not do so. He was pleased that the Commission also favoured that approach and welcomed the preparation of guidelines to clarify and elaborate the legal regime incorporated in the Vienna Conventions.

67. The definition of objections proposed in draft guideline 2.6.1 was not fully consistent with the Vienna Convention and, in particular, article 20, paragraph 4 (b) thereof. The Legal and Treaty Departments of Pakistan's Ministry of Foreign Affairs received copies of depositary notifications from the Secretary-General of the United Nations, in his capacity as depositary of various treaties, which formulated objections to reservations to treaties made by other States and expressly clarified that the objection in question would not prevent the treaty's entry into force between the author of the reservation and the author of the objection. He therefore supported the existing regime of the 1969 Vienna Convention and State practice and considered that the proposed definition was not desirable. He also shared the view, expressed by the representative of the United States of America, that the guidelines relating to the late formulation of reservations was not consistent with the timing requirements provided in the 1969 Vienna Convention and would produce uncertainties in the treaty relationship. Lastly, his delegation was opposed to giving the depositary a role in determining whether a reservation to a treaty was permissible, as provided in draft guideline 2.1.8; that function belonged not to the depositary but to the States parties to the treaty. For those reasons, the draft guidelines should be examined in greater depth.

68. **Mr. Dolatyar** (Islamic Republic of Iran) reiterated his delegation's position that the flag State could not exercise diplomatic protection on behalf of a ship's crew; any reference to the judgement of the International Tribunal for the Law of the Sea in the *Saiga* case should be viewed in the context of the Convention on the Law of the Sea, article 292 of which called for the prompt release of vessels and their crews; as a *lex specialis*, that article did not establish, expand or modify the rules embodied in the institution of diplomatic protection. With respect to the draft articles adopted in 2003 and, in particular, draft article 17 on the State of nationality of the corporation, he agreed with the Commission that the State in which the corporation was incorporated was entitled to exercise diplomatic protection, a view consistent with the decision of the International Court of Justice in the *Barcelona Traction* case. However, in order to avoid the potential problem of "States of convenience" or "tax haven States", a reference to the existence of an effective link between the corporation and the State of nationality should be included. The bracketed text in article 17, paragraph 2, could serve that purpose; the brackets should be removed. Furthermore, article 18 did not reflect existing customary international law; he agreed with the Greek delegation that paragraph b of that article introduced an unbalanced exception to the rule established in article 17 which was highly controversial and could jeopardize the principle of equal treatment of national and non-national shareholders. He also had some sympathy with

members of the Commission who had suggested that article 19 should be incorporated into article 18.

69. Turning to article 21, he noted the view, expressed in the Commission, that existing regimes for the protection of investments should not be superseded or modified. Article 22 on diplomatic protection of legal persons other than corporations might pose problems of practical implementation since the means of establishment and functions of legal persons varied greatly and since, in a number of cases, they were not recognized by the State in whose territory they were active. In his view, article 22 was an extreme example of *lex ferenda* and an abstract prediction rather than a simple analogy or a case of progressive development.

70. On the topic of reservations to treaties, he welcomed the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1970 and 1986 Vienna Conventions and assumed that the Commission's work on the topic would be based on that common understanding. He also welcomed the Special Rapporteur's intention to submit draft guidelines on a "reservation dialogue" at the next session of the Commission since that would contribute to the integrity of treaties while maintaining the basic principle of States' consent. That issue was related to the doctrine of "super-maximum" effect; since reservations constituted basic elements of States' consent in acceding to treaties, an objection with "super-maximum" effect destroyed that element for the sake of the treaty's integrity. The proposed new wording of draft guideline 2.6.1 could strike a balance between the consent of sovereign States and the integrity of treaties.

71. He joined those delegations which had expressed doubts regarding the applicability of principles contained in the Convention on the Law of Non-navigational Uses of International Watercourses to the topic of shared natural resources; the guiding principles for the topic should be those governing the permanent sovereignty of States over their natural resources, enshrined in General Assembly resolution 1803 (XVII).

72. **Ms. Rivero** (Uruguay) said that the topic of shared natural resources was especially important for Uruguay since a huge lake, the Guarani Aquifer, extended beneath the territory of Argentina, Brazil and Paraguay. The four States members of the Southern Common Market (MERCOSUR) had developed a project for the environmental protection and sustainable development of the aquifer system, focusing on prevention, in order to prevent misuse of the resource and ensure its protection.

73. The problem of scope must be resolved before codification of the topic could begin, as seen from the title of the topic: her delegation believed that the title should be "transboundary natural resources" since such resources extended across territories under the jurisdiction of more than one State and therefore required the formulation of international principles and norms. The word "shared" was not sufficiently specific since a resource that was not transboundary could nevertheless be shared, in which case the State in which it was located was responsible for regulating it. The norms established should be applicable to all transboundary groundwaters, whether or not they were exploited or used by more than one State. A second issue was the scope of the Commission's work since transboundary groundwaters had certain characteristics in common with oil and gas. While it seemed logical for the work of codification and progressive development to cover all three types of resource, that did not mean that they should be dealt with simultaneously from the beginning; she endorsed the Special Rapporteur's proposal to deal with groundwaters first and, at a later stage, with oil and gas in order to determine whether it was possible to formulate international principles or norms applicable to all three of them.

74. The Commission should consider which principles would best meet the needs of States which, for geological or geographical reasons, shared resources with other States; the principles enshrined in the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses could provide a good guide in that respect. In any event, there should be no attempt to establish a detailed set of regulations in the beginning, but rather to agree on the most important general principles, including that of *sic utere tuo ut alienum non laedas*, all within the framework of the principle of sovereignty and avoiding any mention of the principle of the global commons or similar notions.

75. She was pleased that, following the predominant trend in international legal doctrine seen in the *Barcelona Traction* case, none of the alternatives for article 17 of the draft articles on diplomatic protection would grant the State of nationality of a corporation the

right to exercise diplomatic protection on behalf of the shareholders. In her opinion, the clearest wording was that of the original text of draft article 17. There was no need to set more than one criterion for the link between the State and the corporation; thus, the bracketed text ("and in whose territory it has its registered office") should be deleted. She therefore regretted that the Commission had tended towards the wording proposed by the Working Group since the effort to achieve consistency with draft article 3 made draft article 17 somewhat confused and departed from the position taken by the International Court of Justice in the *Barcelona Traction* case.

76. Her delegation was concerned at the exception contained in draft article 18, paragraph b, which would entitle the State of nationality of shareholders to exercise diplomatic protection on their behalf if the corporation had the nationality of the State responsible for causing injury to the corporation. Such an exception would violate certain accepted principles of international law, such as the principle of equal treatment of national and non-national shareholders and the principle that a State did not incur international responsibility by causing harm to a shareholder of its nationality.

77. With respect to draft article 21, she thought that the inclusion in the draft articles of codification of the *lex specialis* created serious problems; she agreed with the Special Rapporteur that it would be preferable not to include any such provision. Lastly, she agreed that draft article 22 should apply the principle expounded in regard to corporations to other legal persons, *mutatis mutandis*. The lack of State practice in that area was not an obstacle since provision should be made for the future continued increase in the number of legal persons, other than corporations, which operated in States other than their State of nationality and could suffer injury resulting from internationally wrongful acts committed by the State in which they operated. It would also seem fair to apply to such legal persons the same rules as those applied to corporations.

78. Lastly, she joined those who had supported the Austrian and Swedish initiative to revitalize the debate on the report of the Commission in the Committee.

Agenda item 150: Convention on jurisdictional immunities of States and their property (*continued*) (A/C.6/58/L.20)

79. **Mr. Yamada** (Japan), introducing the draft resolution (A/C.6/58/L.20), announced that Australia, Denmark, Finland, France, India, Ireland, the Islamic Republic of Iran, Slovakia, South Africa, Spain, Sweden, Ukraine, the United Kingdom and Viet Nam had become sponsors. The Committee, in its debates, had expressed appreciation for the work of the Ad Hoc Committee in completing its consideration of the draft articles and for the understandings regarding the broad support for the adoption of a convention on jurisdictional immunities and the need for the Ad Hoc Committee to meet again in order to prepare the text thereof. Under the draft resolution, which was basically procedural, the Ad Hoc Committee would reconvene in March 2004 with the mandate to formulate a preamble and final clauses, with a view to completing a convention on jurisdictional immunities of States and their property and the item would be included in the provisional agenda of the fifty-ninth session of the General Assembly.

Agenda item 156: Measures to eliminate international terrorism (*continued*) (A/C.6/58/L.19)

80. **Mr. Bliss** (Australia) introduced the draft resolution (A/C.6/58/L.19) and said that it followed the model of General Assembly resolution 57/27, which had been adopted by consensus. The eighth preambular paragraph recalled the Assembly's strong condemnation of the attack on the headquarters of the United Nations Assistance Mission in Iraq and the body of the draft resolution reiterated the need for States to cooperate in combating terrorism, recognized the work of United Nations bodies on that issue and decided that the Ad Hoc Committee would continue to elaborate a draft comprehensive convention on international terrorism and would continue its efforts to resolve the outstanding issues relating to the elaboration of a draft international convention for the suppression of acts of nuclear terrorism as a means of developing a comprehensive framework of conventions in that area.

Agenda item 157: Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel (*continued*) (A/C.6/58/L.22)

81. **Ms. Geddis** (New Zealand) introduced draft resolution A/C.6/58/L.22, which was based on the resolutions on that topic which the General Assembly had adopted during the past two years, and announced that Cyprus, Honduras, Mali, New Zealand, Thailand and Timor-Leste had become sponsors. The second preambular paragraph recalled the strong condemnation of the atrocious and deliberate attack against the headquarters of the United Nations Assistance Mission in Iraq on 19 August 2003 and the body of the draft resolution urged States to take all necessary measures, in accordance with their international obligations, to prevent crimes against United Nations and associated personnel from occurring and decided that the Ad Hoc Committee established under General Assembly resolution 56/89 would reconvene for one week in April 2004 and that the work would continue during the fifty-ninth session of the General Assembly within the framework of a working group of the Sixth Committee.

The meeting rose at 12.50 p.m.